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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1994

ROY ROMER, Governor of the State of Colorado, and the STATE OF COLORADO

*Petitioners,*

v.

RICHARD G. EVANS, et al.,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of the State of Colorado**

## BRIEF AMICI CURIAE OF OREGON CITIZENS ALLIANCE, NO SPECIAL RIGHTS COMMITTEE and STOP SPECIAL RIGHTS-PAC

## IN SUPPORT OF PETITIONERS

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EDITOR'S NOTE

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## CONSENT OF THE PARTIES

*Amici Curiae* have received the consent of the parties to file this Amicus Brief.

Mr. Timothy M. Tymkovich, Solicitor General of the State of Colorado, Counsel for Petitioners has consented in a letter dated April 6, 1995 (Appendix A).

Jean E. Dubofsky, Counsel for Respondents, has consented in a letter dated March 31, 1995 (Appendix B).

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

*Petitioners,*

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of the State of Colorado**

## BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

## INTEREST OF AMICI CURIAE

This case arises in the context of ongoing political controversy. The Oregon Citizens' Alliance (OCA) is a non-profit, 501 (c) 4 organization with an approximate donor base of 20,000 households among its financial supporters and volunteers. The No Special Rights Committee, and Stop Special Rights PAC are non-profit, political action committees created under the umbrella of OCA.

*Amici Curiae* have twice sponsored ballot initiatives to amend Oregon's state constitution similar to Colorodo's Amendment 2 in 1992 and 1994. (Appendices C & D). They have both failed: 56 to 44 percent in 1992 and 51 to 49 percent in 1994. On May 18, 1992, the voters of the City of Springfield, Oregon, passed the first of 26 local measures establishing substantive policy which, like Colorado's

Amendment 2, prohibit their respective local governments from establishing special class status based upon sexual orientation. *Amici Curiae* have organized and promoted twenty city measures and six county measures which the voters have passed.[1] They hope to again sponsor a ballot initiative to amend Oregon's state constitution with a measure similar to Colorado's Amendment 2.

As in Colorado a few Oregon cities (Portland, Corvallis, Ashland and Eugene) have enacted (pro-homosexual) ordinances specifically prohibiting discrimination on the basis of sexual orientation and providing remedies for their violation.

On August 3, 1993, the Oregon State Legislature enacted ORS 659.165, intended to preclude enforcement of the local measures promoted by *amici curiae*, mentioned above.

*Amici curiae*, have challenged the constitutionality of ORS 659.165,[2] and its attempt to draw a truce in Oregon. On April 12, 1995, the Oregon Court of Appeals upheld its constitutionality; as of this writing, review by the State Supreme Court has not been but may be requested.

In the area of homosexual rights, Americans have deeply held beliefs which have been expressed through the political process. *Amici*

---

[1] - The cities in Oregon that enacted municipal legislation similar to Amendment 2, are: Springfield, Cornelius, Junction City, Canby, Cottage Grove, Creswell, Lebanon, Molalla, Estacada, Medford, Sweethome, Oregon City, Oakridge, Keizer, Albany, Roseburg, Turner, Veneta, Grants Pass and Lakeview. The Counties are: Douglas, Josephine, Linn, Klamath, Jackson, and Marion.

[2] - ORS 659.165 provides:

"(1) A political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charger provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.

(2) Any person who believes that a political subdivision has enacted or is enforcing a charter provision, ordinance, resolution or policy in violation of this section may bring an action in circuit court to have the charter provision, ordinance, resolution or policy declared invalid, for injunctive relief and for such other relief as the court may consider appropriate. The court shall aware reasonable attorney fees and costs to a plaintiff who prevails in an action under this subsection.



*Curiae* are very concerned about the danger to Oregonians' constitutional rights to the use of ballot initiatives, to free religious speech, and to their rights to oversee and control the education of their own children. *Amici Curiae* are concerned that the inappropriate creation of a fundamental right for independently identifiable groups to equally participate in the political process, will not only embroil the federal courts in endless claims of wrongs by innumerable, independently identifiable groups, but will more importantly nullify the right of the people of Oregon and this Nation to decide for themselves, through the political process the issue of homosexual rights and community standards of morality.

*Amici Curiae* believe that the newly created fundamental right of an independently identifiably group to equally participate in the political process is not supported by the decisions of this Court, and in fact is in direct contradiction to this Court's decisions concerning judicial restraint in the creation of new fundamental rights.

*Amici Curiae* will share more specifically with the Court their concerns as to how the decision in the present case will affect Oregon. Counsel for *amici curiae* have participated in Oregon state courts on the issue of homosexual rights and the right of the voters to establish substantive policy therein. *Amicus* Oregon Citizens' Alliance believes the expertise of its counsel may be of assistance to the Court in this case.

## STATEMENT OF FACTS

*Amici Curiae* adopt by reference the statement of facts set forth in Petitioner's Brief filed with this Court.

## SUMMARY OF ARGUMENT

*Amici Curiae* support Petitioners in their contention that the decision of the Colorado Supreme Court should be reversed.
*Amici Curiae* contend that a new federal fundamental right has been proclaimed by the Colorado Supreme Court which has no basis in precedent or the principles previously laid down by this Court. As a basis for applying the strict scrutiny standard of review in this constitutional challenge to a state ballot initiative, the new fundamental right granted to 'independently identifiable groups' imperils the very heart

of the right of the people to pass legislation by the initiative process.

*Amici Curiae* further contend that the Colorado Court's unprecedented classi-fication as a civil rights minority (i.e. 'suspect class') of those who practice homosexuality, lesbianism or bisexuality will, if left to stand, threaten the constitutional rights of free religious speech and the right to control the education of one's own children in Oregon.

## ARGUMENT

### A. A NEW FUNDAMENTAL RIGHT

This case is about the improper creation of a new fundamental right in conflict with case law and two hundred years of history. The Colorado Supreme Court has unjustifiably created a frankenstein rule of law to achieve a desired end. The substitution of the concept "independently identifiable group" for the traditional "suspect classifications" in equal protection clause analysis endangers and potentially nullifies the peoples' right to legislate by the initiative process, due to the potentially infinite number of such groups: any group backing any ballot initiative could be an "independently identifiable group" and in case of an election loss could logically argue the new measure causes unconstitutional discrimination against them.

Justice Erickson dissenting in Evans v. Romer, 882 P2d 1335, 1356 (1994) (Evans #2), pointed out that the majority in that case had proclaimed this new fundamental right, i.e. the right of an independently identifiable group to participate equally in the political process and applied a strict scrutiny test. The majority reviewed three different types of political participation cases: reapportionment cases, voting restriction cases, and candidate eligibility cases to justify their application of the strict scrutiny standard of review to Amendment 2. They acknowledged that Amendment 2 was clearly distinct from these cases, but then proceeded anyway to formulate a "fundamental right to participate equally in the political process" and apply it. Evans v. Romer, 854 P2d 1270 1278-79 (1993).

To further support its creation of the new fundamental right, the Colorado Supreme Court relied heavily on Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969); Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d



896 (1982); and Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971). Washington v. Seattle involved a ballot initiative which restricted school bussing. In Hunter v. Erickson, an Akron, Ohio, ordinance required a referendum before the provisions of a fair housing ordinance could be applied. In both cases the effect was peculiarly burdensome to racial minorities and it was the racial nature of the issue in defining governmental decision making structure which violated the Equal Protection Clause of the Fourteenth Amendment. Washington v. Seattle School District No. 1, supra, 458 U.S. at 472. Justice Erickson in his dissents to both Evans I and Evans II, specifically noted that it was the racial focus which triggered the application of the Hunter doctrine. Evans v. Romer, 854 P2d 1270, 1299-1300, (1993); Evans v. Romer, 882 P2d 1335, 1357 (1994).

Strict scrutiny and the consequent 'compelling state interest' requirement has heretofore been applied only to the loss of fundamental rights or a law which impacts "suspect classes" of citizens, i.e. members of a particular race, or nationality. The Court below disagreed that the strict scrutiny standard had to be reserved to "suspect classes" but broadened the applicability to "independently identifiable groups." Thus the Colorado Supreme Court has, despite this Court's holding in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 92 L.Ed. 2d 140 (1986) created a new "suspect class" and called it something different, i.e., an "independently identifiable group". Without any real precedent it extended the laws dealing with racial discrimination into new fields.

The Colorado Court found support for its created fundamental right in Gordon v. Lance, supra. That case involved the requirement of a three-fifths majority to pass a bond issue. The contention there was that the Equal Protection Clause was violated because "yes" votes would have a smaller impact than "no" votes. This Court found no constitutional defect noting that no racial group or "independently identifiable group" could be burdened. The Colorado Supreme Court, rather than recognizing the Hunter doctrine to be based on a suspect classification which was racial in nature, chose to opine that

> "the salient aspect of Hunter which distinguishes it from the situation in Gordon was the absence of a group of voters that

> was independently identifiable' apart from the group created by the statute itself." Evans v. Romer, 854 P2d at 1282.

In explaining its interpretation of the Hunter doctrine, the Colorado Supreme Court acknowledged this Court's decision in James v. Valtierra, 402 U.S. 137, 91 S. Ct. 1331, 28 L.Ed.2d 678 (1971) which again emphasized the racial factor of Hunter. The statute challenged in James (referred to as Article XXXIV) required voter approval via a local referendum for low-rent housing projects. In reconciling James it reasoned that James

> "is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on Hunter." Id. at note 21.

If this reasoning is correct, are not the poor an "independently identifiable group?" Are not people over the age of 70 years old an "independently identifiable group?" (See Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). In fact, without established parameters, the numbers are limitless for independently identifiable groups.

This Court has previously held in Bowers v. Hardwick, supra, that the right to privacy does not extend to all kinds of sexual conduct between consenting adults. 478 U.S. at 186. In addition, this Court went on to hold "that a right to engage in consensual sodomy is not constitutionally protected as a fundamental right since it is neither 'implicit in the concept of ordered liberty,' nor 'deeply rooted in this Nation's history and tradition.'" Padula v. Webster, 822 F2d 97, 103, (D.C. Cir 1987), citing Bowers. Rather, this Court acknowledged that "[p]roscriptions against that conduct have ancient roots." 478 U.S. at 192. And, in fact, this Court refused to invalidate the many state laws which still criminalize this behavior. 478 U.S. at 196. Based upon this holding, this Court applied the rational basis test to it's review of the Georgia criminal sodomy statute at issue in that case and then determined that the presumed beliefs of the Georgia electorate that sodomy is immoral was sufficient to pass it. The District of Columbia Circuit stated:

> "It would be quite anomalous, on its face, to declare status



> defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. * * * If the Court was unwilling to object to state laws that criminalize behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal" Padula v. Webster, supra, 822 F2d at 103. (emphasis added)

If Colorado had simply criminalized homosexual conduct there could be no discussion as to whether persons who practice that conduct may be a minority or "suspect classification" under the Equal Protection clause. How can they become such a minority class simply because Colorado has not criminalized their conduct?

The purpose of Amendment 2 was undoub-tedly to protect and preserve traditional family values. It accomplishes this purpose in a very humane and progressive, and yet firm, but noncriminal, manner. It does not interfere with the rights of privacy of any homosexuals or any other group. It does not prohibit anyone from hiring or renting to homosexuals, but it also, does not prohibit anyone from refusing to hire or rent to homosexuals on moral grounds. It simply prevents the government from granting specially pro-tected or minority status to homosexuals or prohibiting morally derived discrimination against homosexual conduct. The fact that the method chosen was not criminal, should not render Amendment 2 illegal. The people of some states may believe that criminal prosecution is the best method to accomplish such purposes. That is their right and would be a proper exercise of the police power and would be, perhaps, a more efficient approach, but it is not the way that was chosen by the people of Colorado and it should not be the only way. Simply put, persons practicing homosexuality are not and should not be considered a 'suspect class' or anything equivalent for purposes of the equal protection clause.

In considering this Court's decision in James v. Valtierra, supra, *Amici Curiae* submit that the Colorado Supreme Court missed the clea- acknowledgment of the importance of the racial nature of the holding in Hunter:

> "The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing 'special burdens on racial minorities within the governmental process.'" James v. Valtierra, 402 U.S. at 140. (emphasis added)

In James this Court squarely had an opportunity to establish a fundamental right based upon an independently identifiable group to participate in the political process, but it did not, stating:

> "They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." James v. Valtierra, 402 U.S. at 142.

*Amici curiae* submit that this Court has never held that such a fundamental right exists. Rather, as this Court stated in Bowers:

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. * * * There should be therefore great resistance to expanding the substantive reach of the [equal protection clause of the Fourteenth Amendment] particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." Bowers v. Hardwick, supra, 478 U.S. at 194.

Under Oregon v. Hass, 420 US 714, 719, 95 S Ct 1215, 1219, 43 L Ed 2d 570 (1975) a state court cannot impose a rule of federal constitutional law that the Supreme Court has specifically refrained from adopting. *Amici Curiae* submit that the Colorado Supreme Court has erred in so doing.



The standard that should have been applied was the rational basis test rather than the strict scrutiny test. Concerning the rational basis test the Court explained in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985):

> "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."

The rational basis test should be used unless the classification involves fundamental rights or a "suspect class." Under the rational basis test a statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. A classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Courts do not have a license to judge the wisdom, fairness, or logic of legislative choices. Heller v. Doe by Doe, ___US___ 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993).

### B. EFFECT IN OREGON OF THE DECISION IN ROMER V. EVANS

As already mentioned, the decision of the Colorado Court, Evans v. Romer, 882 P2d 1335 (1994) would seriously affect the viability of the ballot initiative process in Oregon if it were the law of the land. The Colorado Supreme Court realized that homosexuals do not constitute a suspect class of citizens as has up to now been required for the strict scrutiny test. So the court called them an "independently identifiable group." Evans v. Romer, 854 P2d 1270, 1283-84. If that should be the new standard there are doubtless many more easily "independently identifiable groups", e.g. all people who have been convicted and sentenced to the penitentiary (they have no right to vote in Oregon), all prostitutes, all smokers, or even -- all people whose last names begin with the letter "A". There are undoubtedly myriads of independently identifiable groups. But how does the body politic or anyone for that matter identify a homosexual or one who is so oriented? That is possible only if that person says so. A person can therefore move into or out of this independently identifiable group

whenever it is to his or her advantage. And if the homosexual activists were to succeed in removing from our culture all moral stigma attached to homosexuality they could even more easily move in and out of the "identifiable group."

If homosexuals, lesbians and bisexuals are an independently identifiable group, then certainly the voters who voted in favor of Ballot Amendment 2 were also. Perhaps they could alternatively be identified as people who are straight or people who are committed to heterosexual marriages or stable families or Biblical standards of morality. What has happened in this case is that the Colorado Supreme Court has removed the rights to equally participate in the political process from the majority of the voters in Colorado. They took a political victory from one independently identifiable group and gave it to another identifiable group--those who practice homosexuality, lesbianism or bisexuality. One or the other of these identifiable groups was bound to lose this contest. The Court's reasoning could probably be adapted to reverse the result of any election contest--be it for a ballot measure or a candidate for office.

*Amici Curiae* here submit that no group in fact lost a right to participate equally in the political process by virtue of Colorado's 1992 election. The opponents of Amendment 2 did and still do have the same identical right to place their own initiative on the ballot just as the proponents did. They have the right to vote. Before the Colorado Court's decision all of the political processes were still open to all. Laws could still be added, modified or repealed by either the legislature or by a direct vote through the initiative process. However the Colorado Court's decision certainly has undermined the right to participate equally in the political process by groups who would use ballot initiatives by the applicability of its reasoning to aid the loser in this political contest. Any losing group could be an independently identifiable group.

The decision of the Colorado Supreme Court in this case is a serious blow to the use of the initiative process in Oregon as it certainly must be in Colorado.

In Oregon the controversy continues over the addition of homosexuals or sexual orientation to the list of protected classes in the



state's civil rights laws. As previously noted *amicus* Oregon Citizen's Alliance (OCA) has twice backed an initiative petition to put a measure similar to Colorado's measure 2 on Oregon's ballot.

OCA hopes to again place such a measure on the ballot. Concerns also include the trampling of the constitutional rights of conservative Christian citizens at the hands of gay activists. Specifically these rights are (1) parents' rights to control the education of their children, and (2) stifling of free expression of religious speech.

One of OCA's prime objectives will be to ensure the right of families to control the education of their children and not have them exposed to or forced to accept the indoctrination of gay activists.

OCA agrees wholeheartedly with former Chief Justice Burger's statement that "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Bowers v. Hardwick, 478 U.S. 186, 197, 106 S.Ct. 2841, 2847, 92 L.Ed. 2d 140 (1986).

Right to control the education of one's own children.

The Supreme Court has on several occasions recognized the right of parents to control the education of their own children. Pierce v. Society of Sisters 268 U.S. 510, 45 S. Ct. 571, 69 L Ed 1070 (1925), Meyer v. Nebraska 262 U.S. 390, 43 S. Ct 625, 67 L E. 1042 (1925); Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

Oregon parents are presently witnessing the subjection of their children in the public schools to indoctrination into the viewpoint of gay activists, specifically that homosexual conduct is to be accepted as a normal and acceptable lifestyle choice. This is frequently done without the parents consent, against the religious and cultural beliefs of the parents and often in secrecy without their knowledge.

Recently an Oregon small town newspaper, the Cottage Grove Sentinel ran an article concerning the upset local parents were feeling when the local Head Start program proposed to include a book or books on homosexual families for pre-schoolers. (See Appendix E).

In October 1992 parents of seventh graders in Astoria, Oregon,

were dismayed to learn their children had been taken on a field trip and given a pro-homosexual presentation included with an anti-drug use skit; the parents were told only that the field trip would deal with anti-drug use education. (Appendix F).

In May 1994, 135 eighth grade boys from Five Oaks Middle School in Beaverton, Oregon (a Portland suburb) were taken to a seminar off campus to promote abstinence and personal responsibility. While there one of the speakers told the boys to have at least two homosexual experiences to know if they are gay or straight. Parents were outraged. The school district then hired a lawyer who had been active in the campaign against OCA's ballot measures to investigate the matter. To the parents this was like hiring the fox to guard the chickens. He minimized the matter by saying that the boys had misunderstood the speaker. (Appendix G).

In an effort to head off the rights of conservative citizens to pass local initiatives concerning homosexuality the 1993 Oregon legislature passed ORS 659.165 (HB 3500) pre-empting and barring enforcement of such measures. *Amici Curiae* made an unsuccessful challenge to the constitutionality of that statute, as previously mentioned. One of the reasons given by the legislature and by the pro-gay forces for this statute was to end the piecemeal, community-by-community pattern of the law on the subject of protected status for those who practice homosexuality, and mandate a statewide policy on the subject. Interestingly this was an argument advanced in favor of Colorado's Amendment 2 to which the Colorado Supreme Court gave no weight.

With the passage of ORS 659.165 the only alternative left to parents such as those mentioned above in Cottage Grove, Astoria, Beaverton or elsewhere is a state constitutional amendment that would prohibit such material from being presented to public school children. The overturning of Colorado's measure 2 could effectively leave them with no recourse whatsoever other than pay tuition in addition to school taxes to put their children in private school. Some mechanism must be in place to allow conservative and/or Christian parents to effectively control the education of their children and shield them from this type of indoctrination if they feel they need to.



First Amendment Free Speech dangers.

For the past several legislative sessions (Oregon's legislature meets for approximately 6 to 8 months every second year) gay activists have introduced bills that would add 'sexual orientation' to the list of minority classifications in the state's civil rights laws.[3] The current version of such a bill is HB 2670. One of its provisions would make an unlawful employment practice "(g) For any person, whether an employer or an employee, to aid, abet, incite compel or coerce the doing of any of the acts forbidden * * * " The forbidden acts include an employer's refusal to hire or employ or to bar or discharge from employment or discriminate in compensation, terms, conditions, or privileges of employment because of a person's "race, religion, * * * sexual orientation * * *". In case someone feels he or she is the victim of such discrimination he is given a cause of action to sue the violator in court.

This bill (HB 2670) is fairly typical of the bills in previous legislatures, though previous bills have also been applicable to places of public accommodation, residential rentals and real estate sales. To date none of these bills have passed, but they illustrate what will come when the governorship, and both houses of the legislature are controlled by friends of the gay activists.

The reduction in freedom of speech arises with the possibility to sue conservative Christians for allegedly "aiding or abetting" discrimination if they should say that homosexuality is wrong or is a sin. This is currently possible under the special ordinances in Portland and Corvallis mentioned above. It could be applied statewide if one of the legislative bills presented by the gay activists should be passed. For the large percentage of conservative Christian citizens sin is a central concept of their religion and homosexual conduct or any sexual conduct outside of heterosexual marriage is very definitely a sin and is wrong. Freedom to say so is extremely important to them, as is the right to attempt to persuade others to their viewpoint. Even the Colorado Supreme court recognized the right of parents to teach their children that homosexuality is wrong. Evans v. Romer, 882 P2d 1335,

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[3] - For example: SB 34 in the 1993 legislature; SB 708 in the 1991 legislature; HB 2325 in the 1987 legislature.

1344 (1994).

As shown above there is no question but what the aiding and abetting clauses would diminish freedom of religious speech. The only safeguard for Oregonians is an Amendment 2 style ballot initiative. A decision affirming the decision of the Colorodo Supreme Court to nullify Amendment 2 would thus have the eventual effect of diminishing the freedom to even say that homosexuality is a sin.

The reasoning of the Colorado Supreme Court rides rough shod over the sensibilities of nearly half the population of both Colorado and Oregon where this issue has been before the voters.



## CONCLUSION

For the reasons set forth above, the Supreme Court should reverse the decision of the Colorado Supreme Court.

Respectfully Submitted,

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Note:
Appendices E through G have been submitted as a lodging in full-size, unreduced format and are available in the Office of the Clerk of the U.S. Supreme Court.

Appendix A

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April 6, 1995

William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

RE: Roy Romer, Governor of Colorado, et al. v. Richard G. Evans, et al., No. 94-1039

Dear Mr. Suter:

Larry Hall on behalf of the Oregon Citizens Alliance (OCA) intends to file an amicus brief in support of the State of Colorado's petition for a writ of certiorari in the United States Supreme Court. As attorney for the State of Colorado, by copy of this letter, I consent to OCA's decision to file a brief in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,

Timothy M. Tymkovich
Solicitor General

TMT:pac
Enclosure (certificate of mailing)
cc: Larry Hall
c/o Oregon Citizens Alliance

Appendix B

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March 31, 1995

Lawrence J. Hall
Attorney at Law
P.O. Box 785
Silverton, OR 97381

Re: Romer v. Evans, U.S. Supreme Court No. 94-1039

Dear Mr. Hall:

Pursuant to Supreme Court Rule 37.2, the respondents consent to your request to file an amicus curiae brief in support of the petitioners in the above-referenced case.

Sincerely,

Jean E. Dubofsky
Counsel for Respondents

JED/kb

## APPENDIX C

### Oregon Ballot Measure 9 (1992)

"Be it Enacted by the People of the State of Oregon:

Paragraph 1. The Constitution of the State of Oregon is amended by creating a new section to be added to an made a part of Article 1 and to read:

Section 41 (1) This state shall not recognize any categorical provision such as "sexual orientation," "sexual preference," and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

## APPENDIX D-1

### Oregon Ballot Measure 13, (1994)

Be it Enacted by the People of the State of Oregon:

The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article !. The new section shall be known as "The Minority Status and Child Protection Act" and will reaD AS FOLLOWS:

Section 41: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.

(1) In the State of Oregon, including all political subdivisions and government units, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.

(2) Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit in the State of Oregon that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.

(a) The state of Oregon, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits on the basis of homosexuality.

## APPENDIX D-2

(b) The State of Oregon, political subdivisions and all units of state and local government, with regard to public employees, shall generally consider private lawful sexual behaviors as non-job related factors, provided such factors do not disrupt the work place and that such consideration does not violate subsections (1) and (2).

(c) Though subsection (1) and (2) are established and in effect, no unit of state or local government shall deny to private persons business licenses, permits or services otherwise due under existing statutes; nor deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Oregon or the Constitution of the United States of America.

(d) Though subsection (1) and (2) are established and in effect, this section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.

(3) The PEOPLE INTEND, that if any part of this enactment be found unconstitutional, the remaining parts shall be held in full force and effect. This Section shall be in all parts self-executing.

Cottage Grove Sentinel

...r 29 Cottage Grove, Oregon, Wednesday, February 23, 1994 34 Pages, ...

# Preschool parents stunned by proposed book list

JODY ROLNICK
*Sentinel News Editor*

David Owen describes himself as a supporter of liberal causes.

But the former California environmentalist has taken issue with a letter left to him by his 5-year-old son's Head Start liaison.

The missive alerts parents to a meeting next Monday to review a list of books which include the topic of homosexual families.

O Publisher O suggests subject too heavy for little kids, page 4A.

"My reaction was one initially of outrage that they could even think about this," Owen said.

Colleen Stewart, education coordinator for Lane County's Head Start headquarters in Springfield, said that the book list was not meant to offend anyone.

"We're not intending to discuss homosexuality," she said. "It's about acceptance of different families."

On the list are seven categories of books about families. The reading material ranges from single-parented and step-parented families to families of color and accepted differences.

Teachers at Head Start's 12 sites were asked to choose the top three or four titles in each area for parents to review. Then, after several meetings and discussions, the books were to be left in Head Start site libraries.

The books are part of a larger move toward an anti-bias curriculum that Head Start employees are implementing. From NAEYC

"Our goal is to make sure each child feels good about who he or she is. We don't judge people's religion, job, or family; we respect everyone's different ways to live," says a Head Start notice to teachers.

So the idea of including books that mention gay or lesbian parented families is just an extension of letting kids know that all families are accepted, Stewart said.

But Owen believes that the subject is too politically charged and too advanced for preschoolers.

He said he laughed when the Oregon Citizens Alliance, in its attempt to curtail gay rights during a statewide initiative in 1992, said that schools want to teach that homosexuality is an accepted form of behavior. The conservative political group mentioned several of the titles on the Head Start list.

"I figured that this would never happen here. That they were talking about something that was happening in New York City, not in our town," Owen said.

Stewart said the books are not necessarily intended to spark discussion about gays and lesbians. Rather, the reading material just presents families in all of their various forms.

Teachers will be trained on how to deal with questions, but will not discuss homosexuality with the children, Stewart said. "That's not appropriate for 4-year-olds," she said.

Stewart said the book list has caused some discussion in some of the 12 communities where Head Start has facilities, but mostly, she said, parents don't have a problem with it.

Discussion over concerns is welcome, Stewart said, especially at Monday's 1 p.m. meeting for parents. Dialogue over the books will probably spill out over the course of a few weeks.

Head Start is a federally-funded program for pre-school age children of low income families.

There are nearly 60 children in Cottage Grove served by Head Start.

Appendix E

Appendix F-1

THE DAILY ASTORIAN
THURSDAY, OCTOBER 22, 1992
119th YEAR, No. 81

# Performing group stands by its skits

## *Leader says parents should have been better informed about controversial field trip*

By SELINA DANKO
Of The Daily Astorian

Members of a touring youth group, whose recent appearance in Astoria has drawn the ire of some parents of Lewis and Clark and Warrenton Grade school seventh-graders, are not apologizing for their controversial performance.

"I didn't find any of it objectionable," said Theresa Russo, who is the director of education and training for Planned Parenthood in Portland and works with the Performance group known as Teens and Company. "I personally think it's very tastefully done and the audience seemed to enjoy it," she said.

Russo added that she was sorry the parents of the area seventh-graders attending the performance were not better informed about the content of the field trip.

Some parents are angry about the field trip at the Astoria Masonic Temple attended by about 130 seventh graders from the two schools because they feel they should have been better informed about the material scheduled to be presented to their children.

The Teens and Company group was invited by Robin Andrea, who coordinates anti-drug use counseling for the Astoria public schools to entertain and inform the seventh-graders with a series of skits dealing with issues ranging from eating disorders and birth control to homophobia.

Andrea apologized for not reviewing the material scheduled for the daylong field trip and not providing the parents with more information. He said he received a list of synopses for Teens and Company of the various skits they were going to perform and failed to review them properly. "I read through it and some things didn't register. I didn't preview it nearly well enough."

Jackie Riekkola, whose son Dylan attended the field trip with his Lewis and Clark classmates, is one of those parents angry about the way the field trip was presented. She feels the permission slip sent home to parents

*See Field Trip, Page 10*

Appendix F-2



# *Field trip:* Parents want action from school board

*Continued from Page 1*

describing the field trip as a drug and alcohol prevention program was not adequate. She said she especially objects to two homophobia skits and others that she felt were too sexually explicit for the seventh-graders.

"When I read it (the permission slip) I thought they were referring to the use of alcohol and drugs," Reikkola said.

ADMINISTRATORS IN both schools have promised to review their policies and make sure the proper procedures are followed in the future. But Riekkola isn't happy with the way the matter has been handled so far. She thinks administrators knew more about the field trip before it happened than they are letting on.

Riekkola thinks that while the responsibility is being dumped on Andrea, the blame is far more wide-reaching. She said a group of concerned parents were asking for an emergency meeting of the Astoria School Board and are sending complaint letters asking administrators to look into violations of school policy.

"I thank God for the people like the concerned teacher that is helping us through this from an inside point of view. The public eye is on them and if they don't do something I don't know what we'll do," she said.

Bernard LaCosse, Warrenton school superintendent, said that staff will be discussing the field trip with seventh-graders in Warrenton today. He denied having any previous knowledge of the material presented to them by Teens and Company other than that it was a drug and alcohol prevention program.

The field trip comes as Oregon voters prepare to vote on controversial Ballot Measure 9, the anti-gay rights measure that would prevent school and other government entities from encouraging or facilitating homosexuality.

Public schools would be required to teach that homosexuality is wrong. The measure, sponsored by the conservative Oregon Citizens Alliance, would amend the Oregon constitution to declare homosexuality abnormal, wrong, unnatural and perverse along with such behaviors as pedophilia and sadomasochism. It would outlaw special privileges for homosexuals.

Andrea said in defense of the program that all of the issues presented in the series of skits performed by the visiting group made up of about a dozen Portland high school students, relate to drug use.

MARGARET FRIMOTH, A state-recognized counselor for sexually abused children and women in Astoria, said she thought the Teens and Company presentation was appropriate

Because of societal pressures, homosexual youth are more apt to become involved in drugs and alcohol and to commit suicide than heterosexual children, she said. For that reason, drug and alcohol prevention programs should address sexual orientation, she said. Anyone on the cutting edge of teen drug and alcohol counseling knows that, she said.

The seventh graders spent the morning of Oct. 13, the day of the field trip, coming up with ideas for positive activities for teens that are alcohol and drug free, according to Andrea. The group then watched a film about choices and consequences in dealing with alcohol and drugs, Andrea said.

The Teens and Company skits were performed after a lunch intermission.

Page 2A
August 1994
Oregon News-Leader

# Firm hired to investigate Five Oaks

The Beaverton School District, apparently hoping to head off potential lawsuits from angry parents, has hired the Portland law firm of Miller and Nash to investigate allegations that former Five Oaks teacher, Larry Smith, encouraged students to experiment with homosexuality.

This is just the latest development in a long and emotional conflict between school officials and the parents of a group of eighth grade boys who attended a May 10th seminar in which Smith was an instructor. Students allege that Smith told the boys to "have at least two homosexual experiences" to help them determine their sexual orientation. This alleged comment was made following the presentation of a film called "Stale Roles and Tight Buns," which discussed topics such as male stereotypes and the use of phallic symbols in advertising.

The Miller and Nash investigation begins amidst a new flurry of interest in the affair by community leaders on both sides of the "gay-rights" issue. Openly homosexual State Representative, George Eighmey, waded into the controversy recently with a letter on official stationary defending Smith and chastising school and health officials for too quickly apologizing to parents. The letter also challenged assertions made in an Oregon Citizens Alliance distributed document called the Five Oaks Fact Sheet, specifically a claim that Smith had been reprimanded for similar actions by school officials on other occasions. Eighmey sent copies of the letter to the media.

In response, OCA State Membership Director, Scott Lively, who had compiled the Fact Sheet, sent his own letter to Eighmey and the media. Lively's letter defended the claim, citing public records of at least one prior incident in which Smith had been reprimanded for distributing invitations to a homosexual youth conference to Five Oaks students. Lively challenged Eighmey to support a call for an independent investigation of the incident by someone with no ties to either OCA or the homosexual community. It is not known whether this letter prompted the hiring of Miller and Nash by the school district.

page 9A

# Five Oaks: How it began

## Guest opinion by S. Lively

The other night I attended a meeting at Five Oaks Middle School in Beaverton to watch a video called "Stale Roles and Tight Buns." The meeting was arranged by parents at Five Oaks to see what their children had been exposed to at a seminar sponsored by the Washington County Department of Health and Human Services. At the May 10th seminar (billed to parents as a program promoting sexual abstinence), a number of eighth grade boys were shown this video and then allegedly advised by teacher, Larry Smith, to have at least two same sex experiences so they could know if they were "gay." Students also claim Smith advised the boys on selecting lubricants for condoms.

Ostensibly concerned with challenging "stereotypes" of men in advertising, the video denigrated traditional male roles. Much worse, however, was a section about "male bodies" in ads. A number of sensual images of men were shown as the narrator told the viewer to focus on their genitals. The narrator used immature and inappropriate humor, ending the segment with the admonition to "keep looking out for those 'third legs.'" A suggested lack of intimacy among men was attributed to a "homophobic" fear of being perceived as "gay."

After the video, a boy who had attended the seminar stood up in the meeting and testified that Smith had indeed encouraged the boys to experiment with homosexuality. He contested the statement by officials that this was an innocent response to student questions, insisting that Smith's comments were totally unsolicited. According to the young man, Smith gave some of the boys his name and phone number on slips of paper.

When this story hit the news in Portland it undoubtedly shocked many people who had previously refused to believe OCA about the promotion of homosexuality in the schools. The fact is, however, that the Oregon Health Department is fully committed to furthering the homosexual agenda in the public schools. In 1992, under Claudia Webster, the Department co-sponsored a conference for educators which featured Project 10 Founder, Virginia Uribe. Project 10 promotes the discredited notion that 10% of students are homosexual and refers gender confused students to outside "counselors" for help in exploring their sexuality. Uribe told educators "Get your stuff going before you ask permission. It's better to say 'I'm sorry' than 'may I.'" It was no surprise to me when another parent reported that Claudia Webster had admitted to collaborating on the Five Oaks project with Smith as a county-wide pilot.

While the situation at Five Oaks is far from resolved, the fact that parents have organized leads me to believe that it will be brought to its proper conclusion. But the fact remains that there are many teachers and administrators in Oregon with the same political objectives as Webster and Smith. They want affirmation of homosexuality to our kids and they are following Virginia Uribe's advice to get their "stuff" in without asking permission.

Whether or not they get away with it is up to us.



Oregon News Leader, Sept. 1994

# Five Oaks investigation clears District, Smith

by Davis Dyer for the *Oregon News-Leader*

Hoping to put to rest the controversy raging for four months, two attorneys have issued their findings to the Beaverton School District regarding allegations of homosexual promotion at Five Oaks Middle School. At the heart of the investigation was the showing of a video tape program, "Stale Roles and Tight Buns" and subsequent discussion by Larry Smith in a workshop dealing with male stereotypes in modern society. Smith is a District teacher who was on sabbatical with Oregon Department of Health last year. Several students and their parents alleged that Smith encouraged the eighth grade boys to have at least two homosexual experiences in order to determine their sexual orientation.

Last month we reported that the School District had hired the Portland law firm of Miller, Nash, et al, to investigate the charges and report their conclusions and recommendations for further action.

In their report, attorneys Clifford N. Carlson, Jr. and Bruce L. Campbell fairly exonerated the District, school, outside agencies, and Larry Smith of any wrongdoing. Their conclusion: blame it on the kids.

In a copy of their "Confidential Report" to District Superintendent Dr. Yvonne Katz obtained by the *News-Leader*, Carlson and Campbell place the fault squarely on the shoulders of those students and their parents who are complaining the loudest.

While admitting that Smith did go "well beyond the scope of his topic," they conclude that the students "misconstrued" Smith's statements because "(1) the comments involved a controversial subject, (2) Mr. Smith has no classroom experience in teaching human sexuality, and (3) the students were unruly and not paying close attention to the presenters."

Carlson and Campbell interviewed "approximately 25 Five Oaks students who attended the workshop, together with their parents," teachers, county officials, and District administrators who had any part in putting on the workshop, and Larry Smith.

Please see Report, p. 9A

## Report

Continued from 1A

They also reviewed written District policy statements, teaching materials from the workshop, and material handed out to the students.

The report stated that the District clearly informed both the county health department and Community Youth Services regarding the District's abstinence-based curriculum. Workshop planners knew that "condom use, homosexuality, abortion, and HIV/AIDS would not be appropriate topics for the workshop."

Decisions the District made regarding logistics, however, "combined to create a chaotic atmosphere that helped to facilitate the problems that occurred at the workshop." Allowing more students to attend the workshop than had been planned, sending too few staff to supervise and control them, and holding the workshop off-campus were suspect.

The county agencies were criticized for not telling the District that Smith would be participating. They also neglected to "instruct Mr. Smith to abide by the School District's guidelines for human sexuality education." Because Smith had been a teacher with the District, they "assumed that Mr. Smith was fully aware" of the District's policies.

The students, however, received the greatest blame. "[M]any of the students at the workshop behaved inappropriately." From the very first keynote address and through all of the sessions, the students' behavior was "unruly," "rude," and at times bad enough to force presenters to stop and remove students from the room.

"On several occasions, the students baited and challenged the presenters by asking inappropriate questions or by making rude comments."

Although the report is straightforward in its criticism of Smith's actions, on the crucial matter — encouraging the students to have at least two homosexual experiences to determine if one is homosexual — it completely absolves him.

"Although Mr. Smith's portion of the workshop was intended to address only the stereotyping of male roles in advertising, it is clear that Mr. Smith spent a significant portion of all three of his sessions discussing homosexuality, condoms, and AIDS.

Contrary to Smith's earlier assertions that the topics were raised by the students, the report reveals that he intended to discuss them all along. "Nearly all the students we interviewed stated that Mr. Smith raised the topics." Also, his "placement of several AIDS posters throughout the conference room shows that he intended to discuss AIDS during his sessions." Finally, that he "made similar comments in all three sessions suggests that he had intended to discuss these topics without prompting from the students."

On the central allegation the report states firmly, "Mr. Smith *did not* encourage the students to have homosexual or heterosexual experiences." Instead, according to "Mr. Smith and several students, Mr. Smith said that if a person has two homosexual experiences, it does not necessarily mean that he or she is gay."

The credibility of the assertions by both students and parents is questioned by the report. Even though veiled, connections to the OCA were strong. "Too strong to be ignored, says Lon Mabon, chairman of the OCA. "Carlson is heading up efforts against Measure 13 . This simply goes to show how politically motivated this report is."

"Nearly all the students," the report states, "who claimed that Mr. Smith had encouraged them to have sexual encounters were the sons of parents who have objections to human sexuality education in the School District. Some of the parents stated that this incident is yet another example of the School District's promoting homosexuality.... Several other parents objected to having homosexuals as teachers in the public schools."

Smith was cleared primarily because he "appears to be devoted to the cause of eradicating HIV and AIDS." The report concludes that "it is unlikely that Mr. Smith would be so irresponsible as to urge the students to have sexual encounters."

Smith will not be teaching at Five Oaks School this year. The District reassigned him to Conestoga School, another middle school in the District.

## Report's author chairs anti-13 campaign

by Davis Dyer for the *GN-L*

Clifford Carlson, one of the authors of the report clearing the principals, particularly Larry Smith, in the Five Oaks controversy, is chairman of the No on 13 Board of Trustees. Carlson is a partner with the Miller, Nash law firm in Portland. The firm was hired by the Beaverton School District to conduct an investigation into the controversy swirling about a workshop presented to eighth grade boys at Five Oaks Middle School last May.

In what may present a clear conflict of interest, or at least taint his objectivity, Carlson has been leading up the opposition to Measure 13 since the time OCA began circulating petitions to get it on the ballot.

In a flier under "No on 13" letterhead, Carlson is listed, along with Rep. Gail Shibley, Oregon's first openly homosexual (lesbian) legislator, as one of the board of trustees.

In describing the background of the measure, the flier identifies the OCA as "a far-right political group" seeking to "amend the Oregon Constitution to restrict the individual rights of gay and lesbian persons living in our state."

In a memorandum dated August 22, 1994 sent to "LAWYERS AGAINST BALLOT MEASURE 13" from Carlson and others, he identifies himself as "Chair of No on 13 Board of Trustees." The memo was sent to law offices throughout the Portland Metro area to solicit names to be used in advertisements and money for the campaign.

As to the report to the Beaverton School District, Mabon says, "Carlson obviously knows that the OCA has been using, and will continue to use, the Five Oaks incident in our campaign for Measure 13." He adds, "For him to author this report, essentially whitewashing the whole Five Oaks affair, only to smear the characters of the parents and students who revealed what went on, smacks of political opportunism of the worst kind."